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FILED
DEC 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 573

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

(References to pages of the record showing the proceedings in the Supreme Court of Illinois are indicated by the letters "S.C.P." References to pages of the abstract contained on page 3 of the record, or to the additional abstract, on page 5 of the record, are indicated by the letter "A", or the symbol "Add'l. A.", as the case may be.)

The petitioner, Chicago and North Western Railway Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on June 16, 1955. A timely petition for rehearing was denied on September 19, 1955 (S.C.P. 19). Copy of the judgment is printed herein as Appendix B, *infra*, p. 13a. Copy of the order denying the petition for rehearing is printed herein as Appendix C, *infra*, p. 15a.

Reference to Reports of Opinion Below.

The opinion of the Supreme Court of Illinois (S.C.P., pp. 7-15; Appendix A, *infra*, p. 1a) is reported at 6 Ill. 2d 278, 128 N.E. 2d 723. The trial Court's Findings of Fact and Conclusions of Law, which upheld the petitioner, are on pages 184 to 189, inclusive, of the printed abstract of record.

Jurisdiction.

The judgment sought to be reviewed was rendered June 16, 1955 (S.C.P. 16). Petition for rehearing was filed on July 8, 1955 (S.C.P. 17-18), but was denied September 19, 1955 (S.C.P. 19).

This Court has jurisdiction of the cause under 28 U.S.C., Sections 1257 (3) and 2101 (c).

Questions Presented.

The questions presented for review are:

(1) Whether it was arbitrary, unreasonable, and a denial of due process of law and of equal protection of the laws, for the Department of Revenue to treat as a "standard of value" the reproduction cost of the petitioner's railroad operating property (five times the value indicated by generally recognized and approved standards), and use such reproduction cost as a supposed justification for assessing that property at more than twice the value indicated by such recognized and approved standards, while

other property in the State was assessed at no more than fair cash value.[1]

(2) Whether it was arbitrary, unreasonable, and a denial of due process of law and of the equal protection of the laws for the Department to treat the reproduction cost of petitioner's railroad operating property as a "standard" of its value and thereby produce an assessment more than twice the value indicated by recognized and approved standards of value, while at the same time the Department, in valuing thirty-nine out of forty-five other Illinois railroad operating properties, made final assessments that

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[1] Railroad property in Illinois is assessed under the unit method. All property, including railroad property, constitutes a single class for purposes of the uniformity requirement. The Illinois Supreme Court held in 1940 that railroad property must be equalized on the basis of the average statewide equalization ratio, the State being treated as a single taxing district for this purpose. *Mobile & Ohio R. R. Co.* v. *State Tax Commission*, 374 Ill. 75, 28 N.E. 2d 100. Subsequently legislation was enacted under which the Department has been empowered to equalize property assessments at 100 per cent of fair cash value. The text of the statutory provisions dealing with certification of the Department's railroad assessments to the several counties, and with the mechanics of the equalization process, are set out in Appendix D, *infra*, p. 16a. These provisions evidence a legislative policy, under the constitutional requirement of uniformity, to insure uniform 100 per cent assessments of all classes of property, railroad and other property alike. *Anderson* v. *Park Ridge*, 396 Ill. 235, 72 N.E. 2d 210; *People ex rel. Ruchty* v. *Saad*, 411. 390 (at p. 400), 104 N.E. 2d 273.

did not reflect the high reproduction cost of such properties but, instead, approximated values indicated by recognized and approved standards of value.

(Upon the first of the above questions the decision below conflicts with three decisions of two Circuit Courts of Appeals, the Sixth (*City of Detroit* v. *Detroit & Canada Tunnel Co.*, 92 F. 2nd 833) and the Eighth (*Bailey* v. *Megan*, 102 F. 2nd 651, and *Chicago and North Western Ry. Co.* v. *Eveland*, 13 F. 2nd 442), two of which involved the same property that is involved here, and also conflicts with the logic and rationale of several decisions of this Court. With respect to the second question the decision below conflicts in principle with *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979, and *Hillsborough* v. *Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358.)

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes which this case involves are:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Article IX, Section 1, of the Illinois Constitution, 1953 Illinois Revised Statutes, Page 18,[1] which provides

[1] Page references to the Illinois Statutes refer to the State Bar Association two-volume edition of the Illinois Revised Statutes. Paragraph references are identical in both the Bar Association and the Smith-Hurd Annotated editions of the Illinois Statutes. There is no current "official" compilation.

so far as here material as follows:

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property • • • ".

3. Section 20, Illinois Revenue Act, being Chapter 120, Paragraph 501, 1953 Illinois Revised Statutes, Page 852, which provides that

> "each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale".

4. Section 80 of the Illinois Revenue Act, being Chapter 120, Paragraph 561, 1953 Illinois Revised Statutes, Page 860, which provides for the assessment of railroad property at full fair cash value and directs that in determining fair cash value the Department of Revenue shall consider stock and debt values of the last preceding five years and the last preceding five years' earnings, and such other information as it may consider "as bearing on the fair cash value of the property". The text of so much of this section as is material is set out below in Appendix D.

5. Section 82, Illinois Revenue Act, being Chapter 120, Paragraph 563, 1953 Illinois Revised Statutes, Page 860, which deals with annual returns to be made by railroad companies and requires, *inter alia,* information with respect to reproduction costs.

6. Section 84, Illinois Revenue Act, being Chapter 120, Paragraph 565, 1953 Illinois Revised Statutes, Page 861, which provides for the allocation to Illinois, in the case of railroad property partly within and partly without the State, of the part of the entire railroad system value which is in Illinois, on the basis of named allocation factors, among which is the percentage of reproduction cost within Illinois.

7. The statutory sections providing in detail for the apportionment of railroad assessments among the several counties and for equalization by the Department of Revenue of assessments of other property. In substance, these provisions require certification by the Department to the several counties of its full value railroad assessments apportioned on a mileage basis, and empower the Department to make studies of the relation of assessed values to true values of locally assessed property and to certify to the local authorities multipliers to be applied to local assessments, in order that such assessments also may be on the basis of full value. These provisions are:

Section 86, Illinois Revenue Act, being Chapter 120, Paragraph 567, 1953 Illinois Revised Statutes, Page 861.

Section 130, Illinois Revenue Act, being Chapter 120, Paragraph 611, 1953 Illinois Revised Statutes, Page 871.

Section 146, Illinois Revenue Act, being Chapter 120, Paragraph 626, 1953 Illinois Revised Statutes, Page 873.

Section 148a, Illinois Revenue Act, being Chapter 120, Paragraph 629a, 1953 Illinois Revised Statutes, Page 873.

Section 149, Illinois Revenue Act, being Chapter 120, Paragraph 630, 1953 Illinois Revised Statutes, Page 874.

Section 151, Illinois Revenue Act, being Chapter 120, Paragraph 632, 1953 Illinois Revised Statutes, Page 874.

Because the above provisions are lengthy, their pertinent text is set forth below in Appendix D, *infra*, pages 16a ff.

Statement of the Case.

This case involves the Chicago and North Western Railway Company's operating property assessment for 1953. Petitioner contends, not only that this property was grossly overvalued, but also that because nonrailroad property is assessed at not more than fair cash value (and probably, even after equalization, at less than such value, see *People ex rel. Ruchty v. Saad,* 411 Ill. 390, 398, 104 N. E. 2d 273), and because the valuation placed upon petitioner's operating property is disproportionate to that placed upon other railroads' operating property in Illinois for that year, the assessment is discriminatory.[1]

The Department of Revenue made an original assessment of petitioner's property in the amount of $87,000,000 for the year 1953. The petitioner thereupon made application to the Department, in writing, for review and correction of this assessment, and for reduction of the valuation to $50,000,000 upon the ground that it was arbitrary, far in excess of any reasonable assessment, and had been fixed by giving excessive and undue weight to cost of reproduction, without allowing for obsolescence caused by competing types of transportation and by unbalanced labor costs and other unbalanced conditions and

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[1] Thus the present case meets the test laid down in the minority opinion in *Great Northern R. R.* v. *Weeks,* 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, in which it was said that "it has long been recognized that this discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or in inequality in its valuation". It also meets the test, suggested in *Nashville, Chattanooga & St. Louis Ry.* v. *Browning,* 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254, of discrimination as between railroad assessments, without regard to other property.

factors inherent in the railroad industry. The application concluded with the statement that the original assessment was so arbitrary, discriminatory and unequal that it was a violation of the due process of law and equal protection clauses of the Fourteenth Amendment (A. 31). The parties stipulated (A. 14) that the principal difference on the merits was over the question whether reproduction cost is a proper measure of the value of a railroad system or the portion thereof within the State.[1]

Average five years' earnings of the petitioner, allocated to Illinois, as computed by the Department of Revenue (whose figures are accepted by petitioner), amounted to $36,194,000. The five year average of market values of stock and debt allocated to Illinois amounted to $43,996,000.[2] (A. 18, 19). Reproduction cost, less conventional depreciation, of petitioner's Illinois property at 1951 "period prices" (reflecting the huge inflation of the post-war period), unadjusted to reflect obsolescence and loss of property value because of adverse factors affecting the railroad industry, and especially the petitioner, amounted to $213,000,000 (A. 19). The Department's

[1] Petitioner does not challenge the use of reproduction cost as a factor of allocation of system value as between Illinois and the other states through which its railroad runs. Although not mentioned in Sec. 80 of the Revenue Act, which deals with the determination of "fair cash value", reproduction cost is named in Sec. 84, which deals with allocation, as an approved allocation factor. Relative cost of reproduction is a reasonable measure of the relative quantum of the physical property in each of these states. This is altogether different from treating reproduction cost as representing value.

[2] The Department determined that 28.32% of the entire railroad system value should be allocated to Illinois, and the petitioner agrees that this percentage is reasonable; and the figures shown above represent that per cent of average five years' system earnings and the five year average of market values of securities.

justification for its assessment was only the bare assertion, unsupported by any evidence, that reproduction cost was a "standard of value" (A. 19). A straight average was made of the Illinois stock and debt value, $43,996,000, the Illinois capitalized earnings value, $36,194,000, and the Illinois reproduction cost, $213,000,000, to produce the mathematical result of $97,730,000, which was modified to $87,000,000 (A. 19).

At the hearing the petitioner introduced much evidence tending to show that under present day conditions the reproduction cost of a railroad property, and especially of petitioner's property, is wholly unrelated to commercial value.[1] There was no evidence to the contrary. The

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[1] The record is replete with evidence of diversion of traffic to competing forms of transportation and of erosion of capital value because of modern economic conditions. Expert testimony was also given by Dr. Herbert Simpson, professor emeritus of the Northwestern University School of Commerce, a student of taxation of wide experience, to the effect that under present day conditions there is no relation between the reproduction cost and the value of a railroad property (A. 126-134). His testimony accords with the view of many nonjudicial but informed authorities on taxation. For example, Professor Bonbright of Columbia University, in an article appearing in the National Tax Association Proceedings, 1937, at p. 212, expressed agreement with the view that "value for tax purposes" is utterly different from "value for rate making purposes", and that if a property could not earn a return on the latter because of a business depression or motor competition or for any other cause beyond its control, then the actual commercial value would not equal the rate base, and if commercial value was low, the tax assessment should be correspondingly corrected. He termed this "a very impressive argument". The fact that he had previously held, and expressed a different view, which he admitted, lends force to his opinion. Some other similar authorities are shown below, pages 20-21, footnote.

Department's witness admitted that the petitioner's earnings were approximately one per cent on reproduction cost (A. 22), 1.42 per cent on investment (A. 148), and about 2½ per cent on the valuation indicated by the assessment (A. 22, 24).[1]

Contrasting with the assessment of petitioner's property, in which reproduction cost thus was so heavily weighted, are the assessments of most of the other Illinois railroads, which fairly approximate values indicated by one or both of the two generally recognized standards. The Department's Supervisor of Rules and Regulations, who also represented the Department as counsel at the hearing, did indeed make the statement that he was "not going to acknowledge that reproduction is not a fair thing to consider when it's a factor used by every other railroad" (Add'l. A. 3), and its witness did testify that "the formula applied to the North Western has been applied in the same manner to all railroads" (A. 24); but the Department's own evidence[2] proves that these statements are incorrect. Varying and apparently capricious downward adjustments were made in the case of every railroad from the mathematical results of the Depart-

[1] The final assessment divided by .2832 produces a system value of $306,300,000. The Department determined that the five year average of earnings was $7,668,000 (A. 18). On this basis the rate of return was about 2½ per cent on the assessment valuation for the five preceding years.

[2] This evidence is in the form of a graph (A. 85) voluntarily produced by the Department and introduced by it in evidence. This graph is reproduced below as Appendix E. The information disclosed by this graph has been put in tabular form in Appendix F.

ment's three-way formula computations, which ranged from 9 per cent (in the case of the Alton & Southern) to 34 per cent (in the case of the Chicago & Eastern Illinois). Forty-one out of the forty-six roads received greater downward adjustments, stated in terms of percentages, than did the North Western. No explanation was made nor any reason given why these adjustments varied so greatly. The end result was that no recourse to reproduction cost is necessary to justify thirty-nine out of the final forty-six railroad assessments, most of which were actually lower than the mathematical average of the two recognized and approved standards, and none so much above either the average, or the higher of the two, as to represent assessments greatly varying from commercial value.[1]

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[1] Appendix F shows the figures for all of the forty-six railroads assessed. The final assessments of twenty-nine of the forty-six roads were less than the mathematical averages of market values of stock and debt and capitalized earnings. The final assessment of seven more roads practically coincided with that mathematical average. That of one road (the Burlington) was slightly above the average but less than the income capitalized. Whatever the mathematical process, it is apparent, therefore, that in the case of these thirty-seven roads the final result does not reflect reproduction costs, which in the case of most of the roads assessed was substantially higher than the values indicated by the other two standards. The assessments of two others, the Rock Island and the Soo Line, can be rationalized on the basis of capitalized earnings. Of the remaining seven, two, the Chicago, West Pullman & Southern and the Manufacturers' Junction, are local switching roads in industrial Cook County. In the case of the other five roads, the assessments of the four other than the North Western are far closer to the standards of commercial value than that of the present petitioner. Details are set out in Appendices F and G.

By way of illustration, in the case of the Gulf, Mobile and Ohio capitalized income (stated in terms of even thousands of dollars) was $62,368,000, stock and bond value was $47,313,000, reproduction cost was $105,380,000 and the assessment was $49,395,000. In the case of the Burlington capitalized income was $157,999,000, stock and bond value was $115,866,000, reproduction cost was $252,797,000, and the assessment was $144,600,000. The sum of the final assessments of all forty-six roads assessed is only 5 per cent in excess of the sum of the averages of the two recognized standards of market values of stock and debt and capitalized earnings of the same forty-six roads and is actually less than the sum of their capitalized earnings.

Following the hearing the Department of Revenue made a token reduction of $250,000, and on December 11, 1953 fixed the final assessment at $86,750,000 (A. 13). Thereupon the petitioner sought judicial review, under the Illinois Administrative Review Act,[1] by filing in the Circuit Court of Du Page County, in which part of the property was situated, a complaint which included the following allegation:

> "The final assessment set forth in the Department's said administrative determination of Novem-

[1] Chapter 110, par. 264 ff., Illinois Revised Statutes, 1953, p. 538 ff; see also sections 138, 139 of the Revenue Act, Chapter 120, par. 619, 620, *ibid.* p. 872. These sections are procedural only. They provide in substance for judicial review on the record made before the Department. Except as these sections prescribe the method, under state practice, for obtaining judicial review, they are not "involved" in this case, and accordingly it has not been deemed necessary or appropriate to include them among the "Statutes Involved", or to set out their text.

ber 1, 1953 is so arbitrary, unreasonable and excessive that it constitutes a taking of the property of the Railway Company without due process of law and denies to it the equal protection of the laws in violation of the State Constitution and of the Fourteenth Amendment to the Constitution of the United States." (A. 9).

The prayer of the complaint was that the record be judicially reviewed and that the administrative decision be set aside and the assessment reduced to $50,000,000.[1]

Upon review of the record before the Department the Circuit Court upheld the petitioner's contentions, concluded that the assessment was "beyond justification", made findings of fact and conclusions of law in favor of the petitioner, and entered judgment that the assessment was arbitrary, unlawful and excessive to the extent that it exceeded $50,000,000, and that the assessment be reduced to $50,000,000 (A. 184-189). The lower Court's findings and conclusions of law made it unnecessary for that Court to pass upon the Federal question raised in the pleadings.

The Department appealed. Under the rules of the Supreme Court of Illinois an appellee must state in his brief the "propositions relied on to sustain the judgment below". The appellee, the present petitioner, stated (on pp. 19-20 of appellee's brief, certified copy of which has been furnished this Court, together with the requisite number of plain copies), among the propositions relied on to sustain the judgment of the Circuit Court, that the assessment was so arbitrary, unreasonable and excessive

[1] In Illinois courts have the power to review and in proper cases to reduce assessments. The opinion in the present case recognized this power but decided the case against the petitioner on the merits.

as to constitute a taking of the appellee's property without due process of law, and so arbitrary and discriminatory against appellee's property compared with the assessments of the other Illinois railroads as to violate the uniformity clause of the Illinois Constitution and to deny to the appellee the equal protection of the laws, and that if Section 80 of the Revenue Act were to be construed as authorizing the assessment, then, as applied to appellee, that Section was unconstitutional as being in violation of the Fourteenth Amendment to the Federal Constitution.

The Illinois Supreme Court reversed the judgment of the Circuit Court of Du Page County upon the express ground that reproduction cost of a railroad property was a proper standard for valuing the property for purposes of taxation. The opinion passed lightly over the discrimination between the petitioner's assessment and those of the other roads. No attempt was made to reconcile the result with contrary authorities. The opinion mentioned, but did not either follow, distinguish or criticize *Bailey* v. *Megan*, 102 F. 2d 651, the comparatively recent case in which the Eighth Circuit Court of Appeals had before it the assessment of the very same system property and reached the opposite conclusion.

A timely petition for rehearing was filed in which it was pointed out, among other things, that because of the discrimination between the petitioner's assessment and the assessments of the other Illinois roads the decision was irreconcilable with *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979, and *Hillsborough* v. *Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358, and that although differing in detail the situation was identical in principle with the

situations in the *Sioux City Bridge* and *Cromwell* cases. It was also pointed out that the decision was in square conflict with *Bailey* v. *Megan*, 102 F. 2d 651, and also with numerous other decisions, including *Parsons* v. *Detroit & Canada Tunnel Co.*, 15 F. Supp. 986, affirmed by the Sixth Circuit Court of Appeals, *sub nomine Detroit* v. *Detroit & Canada Tunnel Co.*, 92 F. 2d 833, and that upon the question of valuation the decision appeared to conflict with this Court's decision in *Great Northern Ry. Co.* v. *Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532. The Fourteenth Amendment was strongly pressed in the petition for rehearing (R. 18), but the Supreme Court of Illinois, on September 19, 1955, denied the petition without opinion and made no change in the text of its original opinion filed herein. (S.C.P. 19; Appendix C, *infra*, p. 15a.

Reasons Relied on for the Allowance of the Writ.

1. **The Supreme Court of Illinois has decided a Federal question of substance that has not been heretofore determined by this Court.**

Whether it is arbitrary, and therefore a violation of the Fourteenth Amendment, to use an excessive and unrealistic reproduction cost as a standard by which to value railroad system property for the purpose of taxation is a question of major importance upon which two Circuit Courts of Appeals have reached a conclusion directly opposite to that reached by the Illinois Supreme Court in the present case. The impact of taxes upon the railroads' financial ability to render efficient service was recognized by Congress in a provision in the Transportation Act of 1940, Section 302(a)(3), for the appointment of a "Board of Investigation and Research", which was

directed to investigate, among other things, "the extent to which taxes are imposed upon such carriers * * * " (54 Statutes at Large 953). That Board's staff made a comprehensive study of the subject and, in September of 1944, submitted its report, which was printed as House Document 160, 79th Congress, 1st Session. The report is sharply critical of reproduction cost as a standard of value for a railroad system and points out (p. 30):

> "It is largely because earnings and stock and bond values reflect the obsolescence which railroads have suffered as the result of overoptimism and the advent of competitive transportation agencies that they are regarded as the most reliable evidences of unit value. And it is largely because original or reproduction cost less physical depreciation and last year's assessment are allowed to influence current-year appraisals that the obsolescence of railroad property has often been underestimated in the assessment process."

The need of strengthening the financial position of common carriers in order to insure their ability to render the service that the nation so vitally requires prompted the recent appointment by the President of an Advisory Committee on Transport Policy and Organization. Reporting to the President, in April of the present year, that Committee, after saying that common carrier service was indispensable, added (p. 4 of Report):

> " * * * yet the financial position of some of the major common carriers is precarious and they lack the means to offer superior service and to apply technological advances with desirable rapidity."

The same report emphasized (p. 6) the importance of "maintenance of a modernized and financially strong system of common carrier transportation".[1]

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[1] This observation was not made in connection with taxation, but confiscatory taxes are of course incompatible with a "financially strong system".

In testimony given on September 19, 1955 before a Subcommittee of the House Interstate Commerce Committee on this report of the Presidential Advisory Committee, Secretary of Commerce Weeks stressed the very great importance of a "well balanced and strong common carrier system for service", but pointed out that today "the common carrier industry * * * is afflicted with financial instability", and that "many common carriers today do not have the means to offer superior service and to apply technological advances with desired rapidity", a situation which he characterized as a "basic weakness" standing "constantly as a threat to the well being and progress of our mass production economy and nationwide produce distribution".

The railroads' taxes in every year beginning with 1947 substantially exceeded net railway operating income.[1]

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[1] The figures (taken from "Railroad Transportation", a statistical record, put out by the Association of American Railroads in December of 1954, page 3, and based on reports on file in the Interstate Commerce Commission) are:

Year	Net Railway Operating Income (In thousands)	Taxes (In thousands)
1947	$ 790,534	$ 949,273
1948	1,014,815	1,043,036
1949	693,957	845,089
1950	1,055,309	1,212,084
1951	956,699	1,223,644
1952	1,091,657	1,282,144
1953	1,122,512	1,205,366

"Net Railway Operating Income" is the net after deduction of operating expenses and taxes from operating revenues, plus operating rent income and minus operating rents payable. It does not include nonoperating income and no deduction is made for fixed charges, such as bond interest. See "Form of Income Statement", Uniform System of Accounts, January 1, 1943, p. 193.

This is especially true in the case of the present petitioner; moreover the present petitioner's taxes, other than United States taxes, representing State ad valorem taxes for the most part, have alone been disproportionately high and in most years have ranged in the neighborhood of seventy per cent, or more, of net railway operating income.[1] Certainly in all fairness, and in the national interest, railroad property taxes, onerous at best, should be based on real values, not fictitious values representing in large part the depreciation of the dollar and having no relation to earning power.

In *Increased Freight Rates, 1951,* 284 I.C.C. 589, at p. 608, the Interstate Commerce Commission pointed out:

> "Inflationary processes are and have been so strong that it is clear that estimates of cost of present day reproduction, while useful in measuring inflationary forces, need not be given controlling consideration in estimating value of public service property for rate making purposes. No prudent man would consider reproducing the properties on the basis of the extremely high reproduction costs estimated."

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[1] Petitioner's system taxes and net system railway operating income for the years 1947 to 1953, inclusive, were:

Year	Net railway operating income	Total Taxes	Other than U. S. Government (principally State ad valorem taxes)
1947	$ 8,458,006	$15,632,100	$5,302,641
1948	10,010,400	15,617,006	5,805,995
1949	2,782,619	11,488,521	6,313,880
1950	9,132,717	15,600,668	6,395,090
1951	7,223,985	13,150,265	5,972,587
1952	8,127,638	13,527,045	6,353,210
1953	8,956,455	12,026,177	6,270,614

Source: Annual "Form A" reports to Interstate Commerce Commission.

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-how railroad earnings in relation to investment costs, o[illegible]reproduction costs, although present here in an extreme f[illegible]are not peculiar to this petitioner nor to one or two y[illegible]ois. Of the forty-six railroads assessed by the Depart-[illegible]nt of Revenue, many important roads show an earning p[illegible]wer far out of line with reproduction cost. As of 1953 [illegible]total Illinois reproduction cost of all Illinois railroads w[illegible] $1,899,672,000, while total average five years earnings, c[illegible]pitalized at six per cent, amounted to $1,092,622,000, and [illegible]tal five year averages of market values of stocks and bonds of all Illinois roads amounted to $874,337,000 (Appendix F, *infra*, p. 23a). In other words, the buyers and sellers of segments of railroads placed a combined market place judgment upon railroad property values of less than half the reproduction cost of such property. And this is not surprising, for the five years' average total earnings of all those properties, allocated to Illinois, is less than 3½ per cent upon Illinois reproduction cost (calculated from figures shown in Appendix F).

Net railway operating income of all American railroads averaged only three and seven tenths per cent on net property investment over the entire period from 1921 to 1953, inclusive ("Railroad Transportation, a Statistical Record", p. 6). During the five years from 1948 to 1952, inclusive, the aggregate return for all the country's railroads on net property investment (lower than reproduction cost) was in the neighborhood of four per cent (*ibid*, p. 10).

In its report in *"Ex Parte 175," Increased Freight Rates, 1951*, 284 I.C.C. 589, *supra*, the Commission set out (at page 611) some figures for representative roads in different regions. For the northwestern region the roads selected were the petitioner, the Milwaukee, the Great Northern and the Northern Pacific. The rate of return for

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these four roads for 1951 was only 2.6 per cent. The Commission observed further (at p. 612):

> "Judged by any standard shown of record, the rates of return earned or prospectively to be earned by the railroads * * * are substandard * * * and as has been shown, the great body of the rail carriers are in the middle class, with aggregate earnings that for the immediate future must be considered as substandard, and inadequate."

Although there is not unanimity on the question among tax administrators, and although, as pointed out in Director Martin's article, in the August, 1955 number of "Taxes" (cited in the footnote below), "some states uncritically employ the Bureau of Valuation or kindred cost figures in making railroad tax assessments", many competent authorities, including some tax administrators, have pointed out the fallacy, and inequity, of using cost as a standard of value, and have criticized its use, at least as a standard worthy of equal weight with the recognized standards or other indicia of value, present and prospective.[1]

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[1] Among the published dissertations on this important subject are the following:

Paper by Professor James C. Bonbright, of Columbia University, National Tax Association Proceedings, 1937, pp. 212-218.

Paper by A. G. Mott of California State Board of Equalization, *ibid*, 1939, pp. 471-479.

"Carrier Taxation", House Document 160, 79th Congress, First Session, especially pp. 30, 102, and 109-111.

Professor Paul E. Alyea, of University of Alabama, "Assessment of Public Utilities in Alabama", Uni-

Although there are a number of lower Federal Court opinions that have dealt with the problem in tax cases, this Court has never passed squarely on the question. In converse situations, however, this Court has rejected reproduction cost for accounting purposes (*Atlanta, Birmingham & Coast R.R. Co.* v. *U.S.*, 296 U.S. 33, 56 S. Ct. 12, 80 L. Ed. 25), as a measure of new capitalization of a reorganized railroad (*Group of Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U.S. 523, 63 S.Ct. 727, 87 L. Ed. 959), and as an element to consider in fixing rates where the traffic could not bear rates sufficient to yield a fair return on reproduction cost (*Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548, 65 S.Ct. 770, 89 L. Ed. 1171). In the *Milwaukee Road* case this court pointed out that "the basic question in a valuation for reorganization pur-

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versity of Alabama, 1952.

James W. Martin, Director of Business Research, College of Commerce, University of Kentucky, paper read before National Association of Tax Administrators, printed in August 1955 "Taxes", 33 "Taxes" 619.

Appraisal of Railroad and Other Public Utility Property for Ad Valorem Tax Purposes, being report of Committee on Unit Valuation, National Association of Tax Administrators, 1954, copyrighted by Federation of Tax Administrators, 1313 East 60th Street, Chicago 37, Illinois, Chapter 11, p. 50 ff.

Professor Mott points out that cost "represents an altogether too convenient short cut", and that in the situation in which the railroads now are, "such short cut methods are certain to lead to excessive values", and that "justice in tax administration therefore demands that ad valorem taxes be assessed in fact upon the value of the property as distinguished from historical cost or estimated reproduction cost".

poses is how much the enterprise in all probability can earn", and that reproduction cost, original cost and actual investment are not relevant. In the *Market Street* case this Court (at p. 564 of the official report) referred to "familiar objections to the reproduction cost method".

The English House of Lords, in a case involving the compensation to be paid the owners of the Grand Trunk Railway when it was taken over by the Dominion of Canada, rejected reproduction cost as a measure of value and limited the compensation to a figure based upon earning power. *Grand Trunk Ry.* v. *The King*, (1923) Appeal Cases 150. The same result would doubtless follow in this country in case a railroad property were taken over by Government authority. This Court in *Great Northern Ry.* v. *Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532, a tax case which nowever did not directly involve the question of reproduction cost, said (at p. 539 of the official report) that "the full and true value of the property is the amount that the owner would be entitled to receive as compensation upon a taking of that property by the State or the United States in the exertion of the power of eminent domain".

Since reproduction cost has been quite generally discarded as not indicating a railroad's value in other situations where a determination of value is necessary, common fairness requires the same rule in tax cases. To hold otherwise would be logically inconsistent. The objections to reproduction cost as a measure of "fair cash value" of a railroad property (as enunciated in the foregoing cases) go to its intrinsic validity for any purpose, not merely to its application in any specific context (such as rate-making, eminent domain, or, in this case, a tax assessment). This Court said in the *Great Northern*

case that "the principles governing the ascertainment of value for the purposes of taxation are the same as those that control in condemnation cases and generally in controversies involving the ascertainment of just compensation". The use of reproduction cost as a standard of value of railroad property for tax purposes, but not in other situations, presents an ever present threat of an excessive and unreasonable financial drain on the nation's railroads and of a consequent diminution of their ability to give both the Government and the public adequate and efficient service which only a decision by this Court can now remove.

2. The decision below conflicts with three Circuit Court of Appeals decisions, two of which involved the same property.

The decision below conflicts squarely with the decisions of the Eighth Circuit Court of Appeals in *Bailey* v. *Megan*, 102 F. 2d 651, and *Chicago and North Western Ry. Co.* v. *Eveland*, 13 F. 2d 442, on the validity, under the Fourteenth Amendment, of measuring the value of petitioner's system operating property for tax assessment purposes by its reproduction cost. These cases involved South Dakota assessments under statutory provisions very similar to the corresponding ones involved here. The Illinois railroad statute provides for the assessment of the railway operating property of the entire railroad system as a unit at "fair cash value." The South Dakota statute in effect in 1935, the year involved in the *Megan* case, provided for assessment of property

at its "true and full value in money". Despite the lack of significant statutory difference, the Court below, in the instant case, did not follow the holding in *Bailey* v. *Megan*, 102 F. 2d 651, that the use of reproduction cost and original cost to determine the full value for assessment purposes of the same system property involved here violated the due process and equal protection clauses of the Fourteenth Amendment.[1] In so holding, the Eighth Circuit Court of Appeals rejected both historical cost and reproduction cost as measures of value and limited the assessment to a figure a little above the amount indicated by security values, which, in that case, as here, indicated a substantially higher value than capitalization of past earnings, and which, that Court said, was the highest amount at which the system property could constitutionally be valued. If this decision had been applied here, the assesssment would be no more than about $45,000,000. The two cases are indistinguishable, and rep-

[1] The opinion below (6 Ill. 2d 278, at p. 286; Appendix A, p. 1a, at p. 8a) said of the *Megan* case that it involved the year 1935 "when it (the property) was in receivership". Some tax authorities have claimed the exact opposite of what appears to be the implication of the quoted phrase, and have argued that the pendency of receivership or reorganization proceedings depresses the market values. "Carrier Taxation", House Document 160, 79th Congress, 1st Session, pages 107, 108. The use by the Court below of the word "receivership" is inaccurate; the reorganization proceedings were under Section 77 of the Federal Bankruptcy Act.

resent a fundamental conflict which is best demonstrated by the following quotations:

Illinois Supreme Court	*Court of Appeals*
(P. 285) "The physical value of property, shown either by reproduction cost or historical cost, has been held to be an important factor in fixing values for taxation purposes * * *. In *People ex rel McDonough v. Grand Trunk Western Railroad Co.* 357 Ill. 493, * * * this court * * * said: 'These factors of reproduction costs and historical cost are important, although not necessarily controlling, in determining the fair cash market value of a railroad property.' * * * (P. 287) In our opinion the authorities do not warrant ignoring the physical value of railroad property in determining its assessed value under ordinary circumstances."	(P. 655) "No doubt, historical cost and reproduction cost less depreciation as determined by the Interstate Commerce Commission would be of help in determining value if one knew or could find out how much to discount such figures for permanent impairment of the value of the system due to highway or other forms of competition and other changed conditions which have apparently come to stay * * *. Without knowing what portions of the system actually justify their present-day existence, the cost of reproducing the entire system, or that portion of it in South Dakota, is not helpful in estimating value. * * * An estimate of value in excess of the amount upon which, it can honestly be believed, the property is capable of earning an acceptable rate of return, cannot be sustained."
(P. 288) "Reproduction cost weighs heavily in the assessment of plaintiff's property because of the relatively poor earning rec-	"A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization

ord of the plaintiff in the five years prior to 1953. That earning record, which reflects competition from trucks, airplanes and private automobiles, is again reflected in the relatively low value of its securities. • • • •

We hold that the assessment need not be tied to the fluctuations of the securities market[1] or the vicissitudes of management • • • ".

of net earnings reflect the effect, upon actual value, of obsolescence; of the competition of other means of transportation, and of all factors affecting earnings; but original cost and cost of reproduction do not reflect adverse economic factors, whether temporary or permanent. It is our opinion that the greatest value which could honestly be accorded to the system for the year 1935 was that produced by the stock and bond method of valuation averaged over the five year period • • • ."

The fundamental question here is whether in determining fair cash value the Fourteenth Amendment precludes the reflection in the final assessment of an artificially estimated and theoretical cost of duplicating petitioner's system facilities when present day conditions indicate clearly that many would never be reproduced, and that such costs are grossly excessive in relation to current market values and earning power. *Bailey* v.

[1] The petitioner has at no time contended and does not here contend for an assessment that is "tied to the fluctuations of the securities market" or the mathematical result of any particular formula, as is indicated by its voluntary concession of an assessment of $50,000,000. Petitioner does however contend that an assessment twice the value placed on the property by buyers and sellers of its securities over a five year period is on its face arbitrary and unreasonable.

Megan, supra, says it does. The decision below, without serious attempt to rationalize its dogmatic pronouncement, says it does not.

Supporting *Bailey* v. *Megan,* and therefore diametrically opposed to the instant case, are:

Chicago and North Western Ry. Co. v. *Eveland,* 13 F. 2d 442;

City of Detroit v. *Detroit & Canada Tunnel Co.,* 92 F. 2d 833;

Franklin County v. *Railroad,* 12 Lea (Tenn.) 521;

Northern Pacific Ry. v. *Adams County,* 1 F. Supp. 163; (Reproduction cost entitled to 20 per cent weight.)

Trustees of Cincinnati Southern Ry. v. *Guenther,* 19 F. 395;

Grand Trunk Western R.R. Co. v. *Brown,* 32 F. Supp. 784; (Reproduction cost entitled to 15 per cent weight.)

Chicago and North Western Ry. Co. v. *Eveland* involved the taxes on the same system property for the year 1922, when adverse factors affecting the railroad industry, and especially this petitioner, were already apparent but had not yet attained the proportions of today. The same Court that afterwards decided the *Megan* case reached the same result in this earlier case, and upon the same ground. The *Detroit and Canada Tunnel Co.* case was a Sixth Circuit decision involving the valuation of the vehicular tunnel under the Detroit River. That Court likewise held, for the same reasons, and upon constitutional grounds, that reproduction cost was not a standard of the value of that property. That case also is

squarely contrary to the decision below. The clear and fundamental conflict between the decision below and these three Federal decisions, of equal authority as precedents, should, and can only, be resolved by a decision of this Court.

3. **The decision of the Supreme Court of Illinois is not in accord with applicable decisions of this Court.**

(a) The decision of the Court below conflicts with the logic and reasoning of this Court's decisions in each of the cases cited above, in the first division of the "Reasons Relied on for the Allowance of the Writ"; moreover, it cannot be reconciled with *Great Northern Ry.* v. *Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532, in which the majority of the Court struck down a railroad assessment for the year 1933 because the precipitous decline in values following the onset of the depression had not been reflected in the assessment. This Court said in that case (at p. 149 of the official report) that the standards of market values of securities and capitalization of earnings were "held by all to be the best method" of arriving at the value of a railroad system.[1] The decline in the present petitioner's net railway operating income following the high levels of the war years parallels the drop in earnings which prompted this Court's decision in the *Great Northern* case. The present petitioner's railway operating income, which was nearly $25,000,000 for 1942, nearly $41,000,000 in 1943, and over $23,000,000 in 1944, dropped

[1] The State's witness in the *Great Northern* case testified that these two methods "are universally approved as the two best evidences of the value of a railroad which are available." 297 U.S. 135 at p. 141.

to less than $11,000,000 in 1946, and to lower figures in the years following that year (A. 122), while the Department's assessments, which had advanced from $54,000,000 for 1940, and $63,309,090 for 1942, to $95,000,000 for 1948 and 1949, were lowered by only modest reductions to the challenged assessment of $86,750,000 for 1953 (A. 178). It is also true here that, as this Court expressed it in the *Great Northern* case, "changed business conditions affecting petitioner's traffic, coupled with competition from new methods of transportation, precluded belief that prospective improvement in petitioner's business and earnings would within a reasonable time, if ever, be sufficient to justify the assessment in question".

The later case of *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 60 S. Ct. 968, 84 L. Ed. 1254, in which this Court distinguished the *Great Northern* case upon the ground that it "must have rested upon considerations peculiar to its own facts", and in which reference was made to the fact that the decision was "by a sharply divided court", has led to some confusion regarding the extent to which the *Great Northern* case and also *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979, should be regarded as authorities. This Court's later decision in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358, has clarified the situation with respect to the *Sioux City Bridge* case, but uncertainty remains as to the *Great Northern* case. The instant case has two significant features which distinguish it from the *Browning* case: (1) Unlike the taxpayer in that case, this petitioner does claim "that its property is singled out from among other public service corporations (i.e., other railroads) for discrimination"; and (2) the Illinois uni-

formity rule is quite different from the Tennessee rule involved in the *Browning* case. The decision below conflicts with the *Great Northern* case rationale. A review of the instant case will afford an opportunity for this Court to clarify the status of the *Great Northern* case as a precedent.

(b) The challenged assessment is discriminatory as between petitioner's property and other railroad properties assessed, and, under the Illinois rule of uniformity, is, *a fortiori*, discriminatory as compared with assessments of other types of property. Accordingly the decision below is contrary to this Court's decisions in *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979, and *Hillsborough* v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358. The final assessments of the great majority of the other railroads were less than or substantially equal to values indicated by commercial standards; no resort to reproduction cost (which in most instances was substantially higher) is necessary to sustain those assessments; the assessment of petitioner's property is double the figure indicated by commercial standards of value; no reason is suggested why the assessment of petitioner's property has been fixed at such a high level other than the high reproduction cost of petitioner's property; the Court below reversed the Circuit Court judgment and upheld the assessment solely upon this ground; the discrimination is obvious. In the *Sioux City Bridge* case, this Court held, overruling the Supreme Court of Nebraska, that it was not incumbent upon the taxpayer to seek correction of the discrimination by attempting to have the assessments of other taxpayers raised, but that where such discrimination was

shown the taxpayer's assessment should be reduced to an equal level with other property of the same class. The present case differs in detail but not in principle. The decision below is not in accord with either the *Sioux City Bridge* or *Cromwell* cases.

Conclusion.

The "power to tax involves the power to destroy" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579). The force of Chief Justice Marshall's famous dictum is well demonstrated in the instant case. Impairment of the financial position of a railroad through the discriminatory use of an unrealistic standard of value for assessment purposes may well result in "killing the goose that lays the golden egg". Heavy taxation, not shared by competing forms of transportation, or even by other railroads to the same extent, has been a major factor in bringing about the present financial plight of this petitioner. That reproduction cost is under present day conditions an unrealistic standard by which to value railroad property has been recognized by the decisions of the various courts cited herein as being in conflict with the instant case. This self-evident truth is likewise implicit in the analogous decisions of this Court, also cited herein. The use of reproduction cost as a standard for tax valuation, approved by the Court below, reflects an unwillingness to face present day realities affecting our transportation industry. General use of this standard by tax assessors is bound to impair the railroads' capacity for rendering effective service.

Fortunately, there is a final barrier against confiscatory taxation. Mr. Justice Holmes observed, in a dissent concurred in by Justices Brandeis and Stone, in *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583:

> "But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits."

Petitioner therefore invokes the jurisdiction of this Court, prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois in this case, and further prays that, upon such review, the judgment be reversed and the cause remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Opinion of the Supreme Court of Illinois

(Filed June 16, 1955)

Docket No. 33510—Agenda 27—March, 1955.

Chicago and North Western Railway Company,
Appellee,

vs.

Department of Revenue,
Appellant.

Mr. Justice Schaefer delivered the opinion of the court:

This is a direct appeal by the Department of Revenue from a judgment of the circuit court of DuPage County, which found that the 1953 assessment of all of the real and personal property of the Chicago and North Western Railway Company in Illinois, in the sum of $86,750,000, was excessive to the extent of $36,750,000, and ordered a reduction to $50,000,000. Revenue and constitutional questions are presented.

The Revenue Act of 1939 imposes the duty of assessing the value of the operating property of railroads for the imposition of the general property tax upon the Department of Revenue, which ascertains the value of the property of each railroad as a unit and then certifies to each taxing district in which property of the railroad is located its appropriate portion of the total statewide value. (Ill. Rev. Stat. 1953, chap. 120, pars. 560-571). The present controversy turns largely upon the folowing provisions of Section 80 of the act:

"For the purpose of determining the fair cash value of the property of any railroad company the commission shall take into consideration the actual or market value of the shares of stock outstanding, the actual or market value of all bonds outstanding and all other indebtedness as shall be applicable, for operating the road, provided, in determining the market value of any such stock or indebtedness the commission shall consider quotations for the next preceding five years; the net earnings of the company during the five calendar years preceding the assessment date; and such other information as the Department may consider as bearing on the fair cash value of the property: Provided, that the facts hereinbefore named shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company."

Section 82 requires every railroad company in Illinois, in April of each year, to furnish the Department specific information, including

"(8) The reproduction cost of the property within Illinois and the total reproduction cost of all property of such company. Said reproduction cost, so far as applicable, shall be as last determined by the United States Interstate Commerce Commission, or other competent authority, plus additions and betterments, less retirements and depreciation to the December 31 next preceding the assessment." and

"(10) Any other information the Department may require to determine the fair cash value of the property of any railroad company, or necessary to carry out the provisions of this Act."

The formula used in assessing plaintiff's property was the same as that used in assessing all other railroads. The Department first took the average of plaintiff's net earnings for the preceding five-year period, which amounted to $7,668,000. Capitalized at six per cent, this amount indicated an estimated system value of $127,800,000. The Department determined that 28.32 per cent of plaintiff's total assets were located in Illinois, and the plaintiff accepted that allocation factor. Application of the allocation factor indicated a value of $36,194,000 for plaintiff's Illinois property, based upon capitalized earnings. The Department then determined the market value of plaintiff's outstanding bonds and other indebtedness and of its shares of stock, based upon high and low monthly quotations for the years 1948 to 1952, inclusive, which amounted to $227,234,000. From this figure, $71,881,000, the value of non-operating property, (intangible investments, $26,024,000; locally assessed property, $5,825,000; cash invested in U. S. Treasury bonds and certificates, $40,032,000,) was deducted, leaving a net market value, based upon the aggregate value of plaintiff's shares of stock and debt, of $155,353,000. Application of the allocation factor reduced this amount to $43,996,000, which represented the market value of plaintiff's outstanding shares and debt allocable to Illinois. The Department next determined that the reproduction cost, less depreciation, of plaintiff's property in Illinois, computed by the Interstate Commerce Commission, was $239,590,000. This amount was reduced by $22,800,000 for public improvements and $3,710,000 for uneconomic branch lines, leaving an estimated reproduction cost less depreciation of $213,000,000.

In arriving at its final assessment, the Department averaged these three factors in the case of plaintiff's property and the property of forty-five other railroad companies. This method was pursued prior to the enactment of the Revenue Act of 1939 and in each year thereafter. The three amounts entering into the calculations, so far as plaintiff is concerned, were: (1) Capitalized earnings value $36,194,000; (2) Stock and debt value, $43,906,000; (3) Reproduction cost, less depreciation, $213,000,000. The average of these three items is $97,730,000.

The railroad assessor of the Department frankly stated that there was no contention that the Department's findings were objectively correct in every detail; that the Department made no claim that any one or more of the evidences or appraisals before it were of conclusive validity; that doubts were resolved by the Department by reducing the assessed valuation of $97,730,000 shown by the formula calculation by the sum of $10,730,000 to arrive at an original assessment of $87,000,000; that in making this reduction factors which seemed to indicate adverse trends and worsened business conditions,—higher wages, truck competition, and the like,—were taken into account. At the hearing before the Department upon the plaintiff's application for correction of the assessment, the valuation was further reduced to $86,750,000.

The trial judge found that the disparity between reproduction cost less depreciation and plaintiff's earning power was so great that reproduction cost was unreliable as a measure of value of its railroad operating property; that the final assessment resulted from giving excessive and undue weight to reproduction cost and was more than 100 per cent in excess of the value resulting from the use of the "statutory standards" of capitalized earnings and

stock and debt market values; that the value of plaintiff's operating property in Illinois, as determined by the Department, was excessive and not within the limits of the proper exercise of judgment or permissible discretion on its part, and that the fair cash value of plaintiff's operating property in Illinois did not exceed $50,000,000. Upon the basis of these findings, judgment was entered reducing the assessment to $50,000,000.

The Department first contends that the Circuit Court was without power to change the challenged assessment except upon a showing of fraud or wilful disregard, as distinguished from an erroneous application, of the statutory command of fair valuation, and that in any event the Department's valuation was sound and was neither fraudulently excessive nor in wilful disregard of the statute.

To justify the exercise of jurisdiction by the trial court in this case it is necessary only to refer to the settled principle that assessments of property may be so excessive and may have been made under such circumstances as to justify the conclusion that the assessment was not honestly made and was known to be excessive, and that under such circumstances assessments have been held to be subject to judicial review. (*People ex rel. Hellyer* v. *Hendrickson*, 373 Ill. 99; *People ex rel. Little* v. *St. Louis Electric Bridge Co.*, 290 Ill. 307; *People's Gas Light and Coke Co.* v. *Stuckart*, 286 Ill. 164; *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 602.) Whether an over-valuation is so excessive as to be fraudulent is largely dependent upon the circumstances of each particular case. (*People ex rel. Nash* v. *Norton*, 358 Ill. 272; *Burton Stock Car Co.* v. *Traeger*, 187 Ill. 9.) To set aside an assessment, it is not necessary to show fraud in its generally accepted meaning; if the taxing authorities have assessed the property at a valuation

grossly in excess of its market value, and the assessment was deliberately and wilfully made, such conduct constitutes a constructive fraud, and the courts will protect the taxpayer against the wrong sought to be perpetrated against him. (*People ex rel. Rhodes* v. *Turk*, 391 Ill. 424; *People ex rel. McGaughey* v. *Wilson*, 367 Ill. 494; *People ex rel. Wangelin* v. *Wiggins Ferry Co.*, 357 Ill. 173; *People ex rel. Little* v. *St. Louis Electric Bridge Co.*, 290 Ill. 307.) Tested in the light of these familiar rules, plaintiff's complaint was sufficient to state a case of constructive fraud.

On the merits plaintiff argues that the most reliable standards in valuing the property of a railroad are the market values of its securities and its capitalized earnings, either singly or in combination, and that where, as here, there is a great disparity between the value indicated by reproduction cost and the value otherwise indicated, reproduction cost is entitled to little, if any, weight. The Department, on the contrary, maintains that the method which it used was not improper.

Throughout its brief plaintiff refers to capitalized earnings and market value of securities as the "statutory standards," and appears to argue that the statute does not permit consideration of reproduction cost in determining the assessed value of railway properties. This position is based on the fact that section 80 specifically requires the Department to take into consideration capitalized earnings and the market value of securities, but does not specifically mention reproduction cost depreciated. It is unsound because section 80 expressly states that the factors which it mentions "shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company." (Ill. Rev. Stat., 1953, chap. 120, par. 561.) And section 82, which prescribes

the information which a railroad must furnish to the Department to enable it to determine fair cash value, requires information as to reproduction cost as well as capitalized earnings and market value of securities. Ill. Rev. Stat., 1953, chap. 120, par. 563.

Railway property is hard to value and the process of valuation has not been subjected to rigid rules. "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." (*Rowley* v. *Chicago & North Western Railway Co.*, 293 U. S. 102, 109.) "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." *Great Northern Railway Co.* v. *Weeks*, 297 U. S. 135, 139.

The physical value of property, shown either by reproduction cost or historical cost, has been held to be an important factor in fixing values for taxation purposes. In *People ex rel. Hellyer* v. *Hendrickson*, 373 Ill. 99, 102, this court observed: "Opinion evidence based only on one factor, which ignores the others, is not sufficient to establish gross over-valuation." In *People ex rel. McDonough* v. *Grand Trunk Western Railroad Co.*, 357 Ill. 493, which involved the valuation of a railroad company's property in Illinois, the taxpayer introduced testimony to prove the

value of its railroad system as an entirety, employing the "stock-and-bond method" and the "capitalized-earnings method." This court pointed out that no testimony was offered to establish the value of the railroad company's property by proving reproduction costs, less depreciation and obsolescence, or the historical cost, and said: "These factors of reproduction costs and historical cost are important, although not necessarily controlling, in determining the fair cash market value of a railroad property." The propriety of the use of reproduction cost in establishing valuations for assessment purposes was also recognized in *Sanitary District of Chicago* v. *Young*, 285 Ill. 351, 360; *People ex rel. Wangelin* v. *St. Louis Bridge Co.*, 357 Ill. 245, 252; *People ex rel. Toman* v. *Chicago Union Station Co.*, 383 Ill. 153.

In *Bailey* v. *Megan*, 102 Fed. 2d 651, the Circuit Court of Appeals held that "the greatest value which could honestly be accorded to the system was that produced by the stock and bond method of valuation averaged over the five year period." That case involved the valuation of the South Dakota property of the plaintiff for the year 1935 when it was in receivership. *Chicago & North Western Railway Co.* v. *Eveland*, 13 Fed. 2d 442, is also relied upon, but we note that the court which decided the *Eveland* case subsequently observed: "The case cited by no means holds that earning capacity is to completely overshadow other factors. Indeed, in that very case other factors were given consideration such as that a $29,000,000 valuation was inferentially held fair on railroad property producing substantially no net earnings whatsoever." *Harris Trust & Savings Bank* v. *Earl*, 26 Fed. 2d 617, 618.

State Railroad Tax Cases, 92 U. S. 575, involved the valuation of three railroad properties in Illinois. It appeared

that the capital stock of one of the carriers "is sunk and is of no value" and that its funded debt "has at present no market value." The argument was advanced that low earnings and low market valuation of the securities of the the railroad company were conclusive as to the valuation of the property. The court answered (p. 606): "there remains what is valued as worth over $2,600,000 of real and personal property, which like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise?" It is true, as plaintiff points out, that the court did say (p. 605) that: "when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock. This would of itself be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt. But this has never been the case in Illinois." But the court added (p. 605): "it is doubtful if this happy state of affairs is likely to prevail soon in that or any other State of the Union. If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. * * * But individuals do not escape taxation on their real and personal property because they are insolvent.

In our opinion the authorities do not warrant ignoring the physical value of railroad property in determining its assessed value under ordinary circumstances, nor do they indicate that an undue weight was given to that factor in this case. The two factors pressed upon us by plaintiff are not without deficiencies as yardsticks of value. In the case of ordinary property, the income which a particular owner is able to realize from it is not considered relevant in determining value. (*Forest Preserve District* v. *Hahn*, 341 Ill. 599.) It is admissible here not because of its intrinsic reliability, but by necessity. Nor is it realistic to regard as conclusive the values which the securities market indicates. Many factors, unrelated to the values of particular property, may play a part in determining the price of securities.

Plaintiff's exhibits in this case show throughout the unreliable characteristics of the two value determinants upon which plaintiff insists. For example, plaintiff's net operating income for 1948 was $10,010,000; for 1949 it was $2,783,000. When those income figures are capitalized at six per cent, a decline in value of $120,450,000 in one year is indicated. In 1950 net operating income was $9,133,000 which, when capitalized, indicates an increase in value of $105,833,000 over 1949. For 1951, value, as indicated by capitalizing income of $7,224,000, declined from 1950 by more than $31,816,000. Using net stock and debt as the criterion, the value of the railway remained constant at approximately $139,000,000 during 1948 and 1949, but increased $14,000,000 from 1949 to 1950 and another $22,000,000 from 1950 to 1951.

Reproduction cost weighs heavily in the assessment of plaintiff's property because of the relatively poor earning record of the plaintiff in the five years prior to 1953. That earning record, which reflects competition from trucks, air-

planes and private automobiles, is again reflected in the relatively low value of its securities. Other railroad companies whose earnings and security values are relatively high in proportion to their reproduction cost would have equal justification for urging that capitalized income and the market value of securities be excluded in determining assessed value.

We hold that the assessment need not be tied to the fluctuations of the securities market or the vicissitudes of management, and that reproduction cost has not been given undue weight in determining the assessed value of plaintiff's property.

The plaintiff also contends that the assessment discriminates against its property in favor of that of other railroads assessed by the Department. This objection is based in large part on the fact that with many of the other railroads in Illinois reproduction costs form a smaller proportion of the figure obtained by averaging the three measures of value than is the case with plaintiff. This result of course follows from the fact that plaintiff's reproduction costs are relatively high as compared with earnings and security prices. But if the formula employed by the Department is permissible, as we have held it is, discrimination is not established by showing that its application bears more heavily on some taxpayers than on others. *Cf. Antioch Milling Co.* v. *Public Service Co.*, 4 Ill. 2d 200, 208.

Plaintiff also appears to suggest that a discrimination has occurred with respect to the Department's practice in setting its final assessment at a figure which is lower than the figure produced by its formula. In plaintiff's case there was a reduction of $10,980,000, about 11 per

cent. Forty-one of the other railroads received reductions which were larger percentagewise. The remaining lines received smaller reductions. The record does not disclose the basis for these reductions, either in plaintiff's case or in the case of other railroads. A difference not shown to be the result of caprice or intentional discrimination is not enough to invalidate the assessment. (*Cf. Department of Revenue* v. *Warren Petroleum Corp.*, 2 Ill. 2d 483, 488.) Plaintiff points out that as a result of the various reductions the final assessment of thirty-seven of the lines is a figure approximately equal to, or less than, the figure which would have been obtained had the Department ignored reproduction cost in its formula. The implication, which is not expressly drawn by the plaintiff, is that the Department, under the guise of making a reduction in assessments has in fact applied to railroads other than the plaintiff a formula based only on capitalized earnings and security prices. From what we have already said it is clear that this charge must be rejected. It is unsubstantiated in the record before us, and the reductions made by the Department may well rest on reasonable, though undisclosed grounds.

The judgment of the Circuit Court of Du Page County is reversed.

Judgment reversed.

APPENDIX B

Judgment of Supreme Court of Illinois

United States of America.

State of Illinois
Supreme Court—ss.

At A Term Of The Supreme Court, begun and held in Springfield, on Monday, the ninth day of May in the year of our Lord, one thousand nine hundred and fifty five, within and for the State of Illinois.

Present: George W. Bristow, Chief Justice

Justice Joseph E. Daily — Justice Walter V. Schaefer
Justice Ralph L. Maxwell — Justice Harry B. Hershey
Justice Ray I. Klingbiel — Justice Charles H. Davis

Latham Castle, Attorney General

Harry G. Newman, Marshal

Attest: Fae I. Searcy, Clerk pro tempore

Be It Remembered that to-wit: on the 16th day of June 1955, the same being one of the days in vacation after the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 33510

Chicago and North Western Railway Company,
Appellee,

vs.

Department of Revenue of the State of Illinois,
Appellant.

Appeal from Circuit Court DuPage County

54-7

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinio.. that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Circuit Court of DuPage County in this behalf rendered, Be Reversed, Annulled, Set Aside And Wholly For Nothing Esteemed.

And it is further considered by the Court that the said appellant recover of and from the said appellee costs by it in this behalf expended to be taxed, and that it have execution therefor.

I, Fae I. Searcy, Cerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this day of A. D. 19

Clerk,
pro tempore

Supreme Court of the State of Illinois.

APPENDIX C.

Order Denying Petition for Rehearing

United States of America

State of Illinois
Supreme Court—ss.

At A Term Of The Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and fifty-five, within and for the State of Illinois.

Present: Harry B. Hershey, Chief Justice

Justice Joseph E. Daily — Justice Walter V. Schaefer
Justice George W. Bristow — Justice Ralph L. Maxwell
Justice Ray I. Klingbiel — Justice Charles H. Davis

Latham Castle, Attorney General

Harry G. Newman, Marshal

Attest: Fae I. Searcy, Clerk Pro Tempore

Be It Remembered, that, to-wit: on the 19th day of September, A. D. 1955, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 33510

Chicago and North Western Railway Company,

Appellee,

vs.

Department of Revenue of the State of Illinois,

Appellant.

Appeal from Circuit Court DuPage County.

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX D

Statutes Involved.

Chapter 120, Illinois Revised Statutes:

"561. Method of determining fair cash value. § 80. The Department (of Revenue) shall assess all property owned or used by railroad companies operating within this State * * *.

"The Department shall, in determining the fair cash value of the property assessed by it, value all the property of any railroad company as a unit, but shall make due allowance for any non-carrier real estate.

"For the purpose of determining the fair cash value of the property of any railroad company the Department shall take into consideration the actual or market value of the shares of stock outstanding, the actual or market value of all bonds outstanding and all other indebtedness as shall be applicable, for operating the road, provided, in determining the market value of any such stock or indebtedness the Department shall consider quotations for the next preceding five years; the net earnings of the company during the five calendar years preceding the assessment date; and such other information as the Department may consider as bearing on the fair cash value of the property; Provided, that the facts hereinbefore named shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company. * * * "

"563. Annual statement to Department of Revenue. § 82. In the month of April of each year every railroad company in this State shall return to the Department, in addition to any other information required by this Act, sworn statements or schedules as follows:

* * * * *

"(8) The reproduction cost of the property within Illinois and the total reproduction cost of all property of such company * * * as last determined by the United States Interstate Commerce Commission * * * plus additions and betterments, less retirements and depreciation * * *."

"565. Interstate allocation of operating property. § 84. If any railroad company owns or uses operating property partly within and partly without this State the (Department) shall determine the value of the entire operating property of such railroad but shall take only that part of such entire value as is represented by the average percentage of (a) the length of all track including main, second and additional main track, side track and turnouts within this State, (b) its gross revenues arising from railroad operations in this State, (c) the reproduction cost of its operating property within this State, as determined by the Interstate Commerce Commission of the United States, or other competent authority, plus additions and betterments, less retirements and depreciation. Provided nothing in this section shall be construed to preclude the use or substitution of such other factors or methods as may appear reasonable and necessary in determining for any railroad the proportion of its operating property or any part thereof within this State."

"567. Distribution of assessments made by Department. § 86. The full fair cash value of the operating property and non-operating personalty of every railroad company subject to assessment shall be listed and taxed in the several taxing districts in the proportion that the length of all the track owned or used in such taxing district bears to the whole length of all the track owned or used in this State * * *.

"The Department shall equalize and distribute the full, fair cash value of the property of every rail-

road company * * * to the respective taxing districts entitled thereto and shall certify the same to the county clerks of the respective counties, who shall extend taxes against such values the same as against other property in such taxing districts."

"611. Duties of Department of Revenue. § 130. The Department shall:

* * * * *

"(7) Equalize the valuation and assessment of property throughout the State between the different counties of the State and fix the aggregate amount of the assessment for each county upon which taxes shall be extended."

"627. Authority of Department to equalize. § 146. * * * The Department shall lower or raise the total assessed value of property in any county as returned by the county clerk so that such property will be assessed at its full, fair cash value.

" * * * the Department shall annually ascertain and determine the percentage relationship, for each county of the State, between the valuations at which locally assessed property is listed by assessors and revised by boards of review or boards of appeals, as the case may be, and the estimated full, fair cash value of such property.

"With the ratio so ascertained and determined for each county, the Department shall then ascertain the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in order to produce a ratio of assessed to full, fair cash value equivalent to one hundred per cent."

"629a. Department to forward estimate of value of locally assessed property in each county to County Cerk—Reconsideration. § 148a. The Department shall forward to the County Clerk of each County, as

hereinafter provided, its estimate of the full, fair cash value, equivalent to one hundred per cent, * * * of the locally assessed property in each county respectively; and the percentage relationship to be certified to such county by the Department * * * shall be determined by the ratio between the estimate so made and forwarded, as provided by this Section, and the assessed valuations * * *."

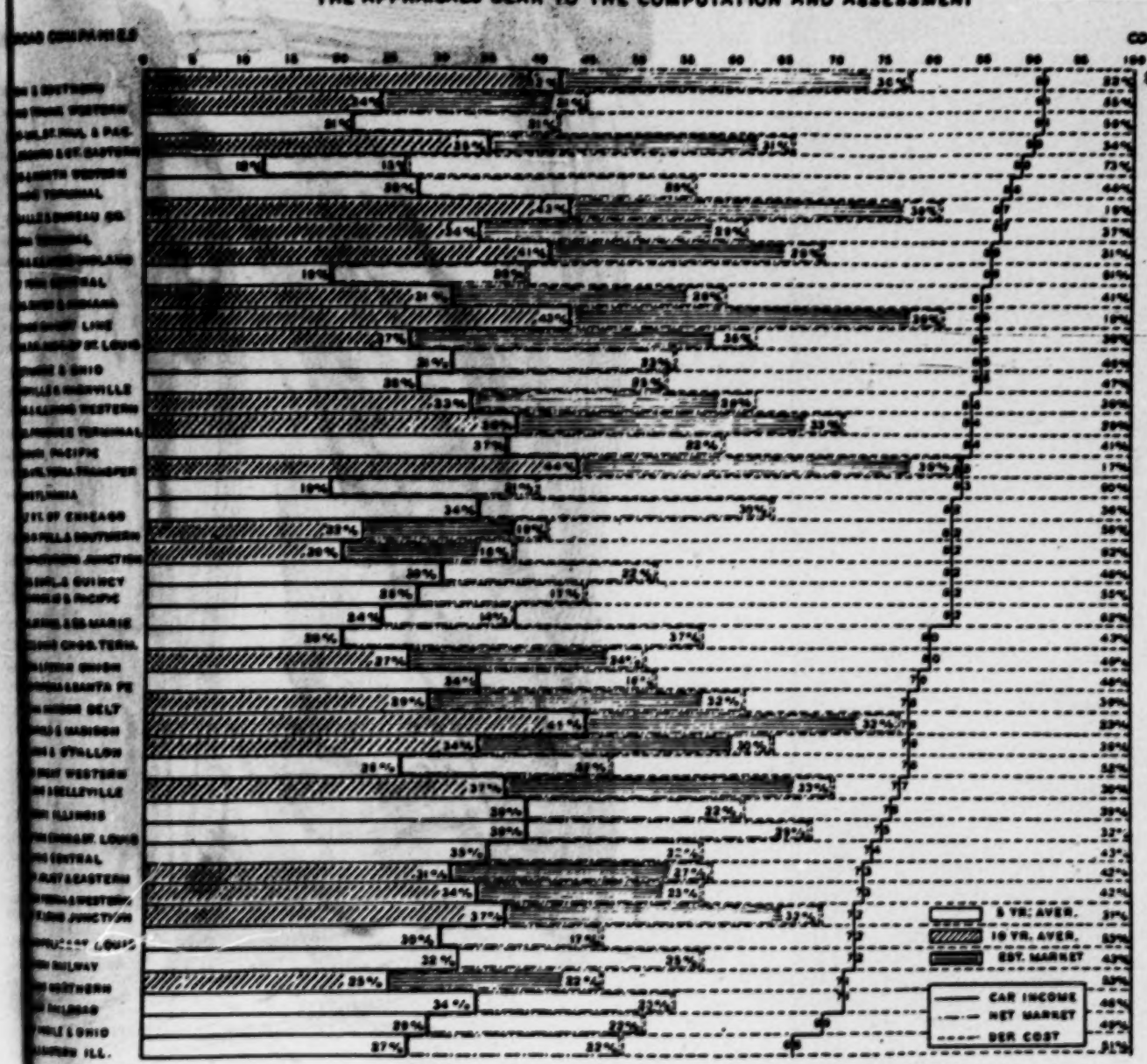
"630. Manner of equalizing. § 149. The assessments of all property * * * shall be equalized by adding to the aggregate assessed value thereof in every county in which the Department may find the valuation to be less than full, fair cash value, such rate per cent as will raise the same to its full, fair cash value, * * * and by deducting from the aggregate assessed value thereof, in every county in which the Department may find the valuation to be more than full, fair cash value, such rate per cent as will reduce the same to its full, fair cash value. * * * "

"632. Certification of equalization rates and Department assessments. § 151. When the Department shall have completed its equalization of assessments for any year, it shall certify to the several county clerks the percentage finally determined by it to be added to or deducted from the listed or assessed valuation of property in the several counties, as returned by the respective county clerks.* * *

"The Department shall also certify to the county clerks of the proper counties the assessments made by it on property owned or used by railroad companies operating within this State, and the distribution of such assessments among the respective taxing districts within the several counties. The county clerks shall extend the taxes for all purposes on the respective amounts so certified, the same as against other property in the taxing districts to which such assessments of railroad property are allocated or distributed."

1953 ILLINOIS RAILROAD COMPANIES

COMPARISON OF 46 RAILROAD COMPANIES SHOWING PERCENTAGE THE APPRAISALS BEAR TO THE COMPUTATION AND ASSESSMENT



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APPENDIX F.

Capitalized income and market values of securities of forty-six Illinois railroads assessed by Department of Revenue, as calculated by the Department, reproduction cost less depreciation, and 1953 ad valorem assessments of each of forty-six Illinois railroads. (Information tabulated from graph attached to Department's Exhibit 1 (A. 85), reproduced as Appendix E herein.)

(All amounts in thousands of dollars)	1	2	3	4	5	6
	Capitalized Income	Net Market Value Securities	Average of Capitalized Income and Market Value of Securities	Reproduction Cost	Mathematical Average of Capitalized Income, Market Value of Securities and Reproduction Cost	Assessment
Alton and Southern	13,031	11,169	12,100	6,826	10,342	9,400
Grand Trunk Western	4,092	3,581	3,837	9,379	5,684	5,150
Chgo. Mil. St. Paul & Pac.	39,845	39,845	39,845	110,048	63,246	57,500
Galesburg & Gt. Eastern	319	283	301	310	304	275
Chgo. North Western	36,194(1)	43,996(1)	40,095	213,000	97,730	86,750
Illinois Terminal	19,008	19,008	19,008	29,868	22,628	19,900
La Salle & Bureau Co.	968	855	912	427	750	650
Peoria Terminal	1,118	954	1,036	1,216	1,096	950
Chgo. & Ill. Midland	18,097	12,359	15,228	13,683	14,713	12,700
New York Central	41,479	43,662	42,571	133,169	72,770	62,625
Chgo. River & Indiana	22,815	20,607	21,711	30,174	24,532	20,950
Chicago Short Line	2,366	2,091	2,229	1,045	1,834	1,550
Term. R.R. Assoc. of St. L.	18,856	24,443	21,650	26,538	23,279	19,700
Baltimore & Ohio	30,314	22,491	26,403	44,983	32,596	27,775
Louisville & Nashville	10,001	8,930	9,466	16,787	11,906	10,200
Chgo. & Ill. Western	2,345	2,061	2,203	2,701	2,369	2,000
Chgo. Produce Term'l.	5,449	4,732	5,091	4,159	4,780	4,000
Missouri Pacific	35,120	20,882	28,001	38,918	31,640	26,500
Chgo. Hts. Term. Transfer	3,973	3,522	3,748	1,535	3,010	2,500
Pennsylvania	36,962	40,852	38,907	116,721	64,845	53,500
Belt Ry. of Chicago	30,298	26,734	28,516	32,080	29,704	24,325
Chgo. W. Pull. & Southern	721	623	672	1,935	1,093	900
Manufacturers' Junction	438	394	416	1,358	730	600
Chgo. Burl. & Quincy	157,999	115,866	136,933	252,797	175,554	144,600
Chgo. Rock Isl. & Pacific	50,330	30,558	40,444	98,863	59,917	49,300
Minn. St. Paul & S. S. Marie	3,518	2,052	2,785	9,088	4,886	4,000
Balt. & Ohio Chgo. Terml.	15,141	28,011	21,576	32,553	25,235	20,100
Peoria & Pekin Union	4,927	4,380	4,654	8,942	6,083	4,900
Atch. Topeka & S. Fe	64,940	34,380	49,660	91,681	63,667	50,000
Indiana Harbor Belt	14,551	16,056	15,304	19,568	16,725	13,000
Litchfield & Madison	8,359	5,944	7,152	4,273	6,192	4,850
St. Louis & O'Fallon	754	665	710	798	739	575
Chicago Great Western	10,245	8,669	9,457	20,491	13,135	10,200
St. Louis & Belleville	1,915	1,708	1,812	1,552	1,725	1,325
Missouri Illinois	7,562	4,266	5,914	7,561	6,463	4,900
New York, Chgo. & St. L.	47,174	35,078	41,126	38,708	40,320	30,300
Illinois Central	104,289	65,553	84,921	128,127	99,323	73,500
Elgin, Joliet & Eastern	40,031	34,866	37,449	54,235	43,044	31,550
Toledo, Peoria & Western	10,134	6,855	8,495	12,816	9,935	7,250
East St. Louis Junction	1,550	1,340	1,445	1,298	1,396	1,000
Minneapolis & St. Louis	4,604	2,609	3,607	8,132	5,115	3,675
Southern Ry.	11,242	8,783	10,013	15,105	11,710	8,400
Illinois Northern	1,271	1,119	1,195	2,695	1,695	1,000
Wabash Railroad	61,593	36,231	48,912	83,331	60,385	43,000
Gulf, Mobile & Ohio	62,368	47,313	54,841	105,380	71,687	49,395
Chgo. & Eastern Ill.	34,316	27,961	31,139	64,818	42,365	27,930
Totals	1,092,622	874,337	983,490	1,899,672	1,288,877	1,035,150

The total assessments, $1,035,150 are 5% in excess of the average of total capitalized income and total market value of securities, $983,490, 18% in excess of total market value, $874,337, and 5% less than total capitalized income, $1,092,622.

(1) Figures testified to by Department's witness Danis. Figures for other roads shown are computed from graph and are only approximate. The North Western assessment figure shown above is the final assessment after the hearing. The figure in the graph for the North Western assessment is $87,000,000.

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APPENDIX G

Percentages by which the seven assessments out of forty-six that cannot be justified on basis of generally recognized standards of value exceed (1) stock and debt valuation (2) capitalized earnings valuation, and (3) average of two.

	Percentages of Excess Over Capitalized		
Name of Road	Market Values	Earnings Value	Average of two
Grand Trunk Western	44%	26%	34%
Chicago, Milwaukee, St. Paul and Pacific	44%	44%	44%
Chicago and North Western	97%	140%	116%
New York Central	43%	51%	47%
Pennsylvania	31%	45%	38%
Chicago, West Pullman & Southern	44%	25%	34%
Manufacturers' Junction	52%	37%	44%

JAN 19 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 573

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

SUPPLEMENT TO PETITION.

NELSON TROTTMAN,
GERALD M. CHAPMAN,
Attorneys for Petitioner.

LOWELL HASTINGS,
PALMER LEEREN,
Of Counsel.

THE DUNLAP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 573.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

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vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

SUPPLEMENT TO PETITION.

The respondent has advised this Court that no opposing brief will be filed on behalf of the respondent, and that respondent will stand on the opinion of the Supreme Court of Illinois, which is shown as Appendix A to the petition. In that opinion the discriminatory adjustments of the Department (shown on the graph, Appendix D to the petition) are summarily disposed of with the pronouncement that discrimination "is unsubstantiated in the record before us, and the reductions made by the Department may well rest on reasonable, though undisclosed grounds." And in the same paragraph the opinion also says that "the record does not disclose the basis for these

reductions, either in plaintiff's case or in the case of other railroads" (Appendix A to petition, page 12a).

In order to show the complete impracticability and the futility of the Court's suggestion that the "undisclosed grounds" be made a part of the record, it is necessary to supplement the petition heretofore filed by fully acquainting this Court with the position of respondent Department of Revenue when petitioner specifically called the Illinois Supreme Court's language to the attention of a Department hearing officer at a hearing held on December 29, 1955, subsequent to the filing of the petition herein, with respect to the assessment for the current year. The following are excerpts from the certified stenographic transcript of that hearing, a copy of which is on file with the respondent:

> "Mr. Trottman (Counsel for petitioner): • • • Now, the evidence on that subject is in the possession of the Department and we seek to comply with the suggestion of the Supreme Court and to ascertain what the reasons are for these reductions and, therefore, I submit I am entirely within my rights in going into these comparatives.
>
> • • • • •
>
> Mr. Ice (the Department Hearing Officer): Well, I am not going to require him to go behind it. That will be the ruling if you are attempting to do it.
>
> Mr. Trottman: I am going to ask some questions at least for the record, if your Honor please. I want to ask Mr. Danis this question:
>
> Q. Calling your attention, Mr. Danis (the Department's Railroad Assessor), to the fact that in the case of the North Western, the reduction is to 85, as compared to the Chicago and Eastern Illinois of 61 percent, I am going to ask you what there was about the North Western situation that would justify a higher percentage on the appraisal value than the Chicago and Eastern Illinois, particularly in view of the sub-

stantially higher earnings of the Chicago and Eastern Illinois and substantially higher market values.

Now, can you mention one single, concrete distinction that would warrant that difference? If you cannot do so, please say so.

Mr. Roach (representing the Department): I object to that again.

Mr. Ice: Sustained. It is the same line of questioning.

Mr. Trottman: Well, I will ask the same question with respect to, oh, let's say the Atchison, Topeka and Santa Fe.

Now, the record shows that the assessment was 73 percent of the appraisal value. The evidence shows that the Santa Fe had a capitalized earnings value representing 33 percent, market value of 20 and reproduction cost of 47.

What fact or facts, Mr. Danis, are there that justify the difference in the treatment of the Santa Fe and the North Western.

Mr. Roach: I would object again * * *.

Mr. Trottman: * * * The witness testified there are three standards or guides, and he has testified that in every case, there have been these averages made as guides.

Now, having used those guides, it is apparent from the arithmetic that there have been discriminations in the reductions made from the formula results.

I am asking why, in this instance, the Santa Fe is reduced to 73 percent and the North Western to 85 percent. What is it? Is it the fact that the North Western has lower earnings than the Santa Fe that calls for a higher percentage of the appraisal value?

Mr. Ice: The objection is sustained.

* * * * *

(The same question was asked as to several other railroads.)

Mr. Trottman: I want to ask this question:

Q. Having in mind the excerpt I read, Mr. Danis, from the Supreme Court opinion as to the possibility of these discriminations resting on reasonable, if un-

disclosed grounds, are you willing to make disclosure of the grounds upon which these discriminations are based?

Mr. Roach: I object to the very question that there is any discriminations here.

Mr. Ice: Sustained.

• • • • •

Mr. Trottman: All right, I will read again the last sentence, Mr. Hearing Officer, of this opinion:

'It is unsubstantiated in the record before us and the reductions made by the Department may well rest on reasonable, although undisclosed, grounds,' and I will now ask the witness again, are you willing to disclose the grounds upon which your reductions are made?

Mr. Roach: I object again.

• • • • •

Mr. Trottman: May I make an observation? It would be utterly impossible for us to go into detail with all these other railroads to make an affirmative case and the evidence, if it exists, is in the possession of the Department.

Mr. Ice: I don't know whether it is impossible or not, but I don't think the Department has to make that disclosure.

Mr. Trottman: In other words, do I understand on this record, that the Department is unwilling to make that disclosure?

Mr. Ice: I think that's correct.

Mr. Trottman: All right, the record shows that."

It is, therefore, quite clear that respondent Department refuses to give any grounds for its reductions, and the practical effect of the Illinois Supreme Court's opinion is to deprive petitioner of its constitutional rights without any possibility of showing the reasons, if any, for the Department's discrimination between various railroads.

It is, of course, elementary that where evidence is completely within the control of one party who fails or re-

fuses to produce it, it will be presumed that the evidence would be unfavorable to that party.

In line with the spirit, at least, of the *Sioux City Bridge* case (*Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979), the present petitioner's assessment should be reduced to correspond with the assessments of the other roads (most of them very much more profitable, as the graph discloses). As the assessment now stands, there is a clear violation of equal protection of the laws and a discrimination similar to that which this Court condemned in the *Sioux City Bridge* case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 573

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN RESPONSE TO THIS COURT'S REQUEST AND IN OPPOSITION TO THE PETITION FOR CERTIORARI.

INTRODUCTORY OBSERVATION.

The Attorney General of Illinois originally notified the Clerk and counsel for petitioner that he elected to stand upon the opinion of the Supreme Court of Illinois as his response to the petition for *certiorari*.

The Court, however, has requested further response to that petition, which response is made in this brief.

The Questions Presented For Review.

Respondent can not acquiesce in petitioner's conception of the questions tendered to this Court. Respondent deems those questions to be as follows:

> DID ILLINOIS DEPRIVE PETITIONER OF DUE PROCESS OR EQUAL PROTECTION BY APPLYING TO PETITIONER'S PROPERTY A FORMULA OF VALUATION, APPLIED TO THE PROPERTIES OF ALL OTHER INTERSTATE RAILROADS AS WELL AS TO THE PROPERTY OF PETITIONER, THAT TAKES INTO ACCOUNT (1) PETITIONER'S NET EARNINGS FOR THE PRECEDING FIVE-YEAR PERIOD, (2) THE MARKET VALUE OF PETITIONER'S OUTSTANDING SECURITIES, BASED UPON HIGH AND LOW MONTHLY QUOTATIONS FOR THE YEARS 1948 THROUGH 1952, AND (3) "REPRODUCTION COST, LESS DEPRECIATION, OF PLAINTIFFF'S PROPERTY IN ILLINOIS", AS COMPUTED BY THE INTERSTATE COMMERCE COMMISSION?
>
> DID ILLINOIS DENY PETITIONER DUE PROCESS OR EQUAL PROTECTION BY REFUSING TO PERMIT PETITIONER TO EXPLORE AND COMPARE THE EFFECT OF THE APPLICATION OF ILLINOIS' GENERIC FORMULA AS APPLIED TO RAILROAD PROPERTIES OTHER THAN THOSE OF PETITIONER?

ARGUMENT.

I.

Illinois' general formula, applied to all interstate railroad property situated in Illinois, does not deny due process or equal protection to petitioner.

Illinois' generic formula or standard of valuation of petitioner's property is adequately described in the opinion. Briefly summarized, that formula, after allocation as to that portion of the railroad's property situated in Illinois as distinguished from its property situated in other States, as to which allocation no question is raised in this case, is a composite of legislative enactment, administrative interpretation and application and judicial pronouncement.

Briefly summarized, that formula requires the taxing authorities, administrative and judicial, to take into account railroad's earnings for five years, the value of the railroad's extant securities averaged over a five-year period, and railroad's reproduction costs.

All of these facts have long been recognized as permissible elements in valuation for tax purposes. The only question presented by the record in the instant case is whether Illinois' formula denies due process of law.

In *Rowley* v. *Chicago and N. W. Ry. Co.*, 293 U. S. 102, an opinion written when this Court conceived itself as vested with far more authority to inquire into mechanisms of valuation than it now asserts, this Court said, at page 109:

> "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weights as reasonably they might be deemed to have." *Great Northern Railway Co.* v. *Weeks*, 297 U. S. 135, 139.

Petitioner contends that the formula does not guarantee to any reasonable degree of assurance a valuation of railroad property as distinguished from a valuation of other elements, such as income, value of franchises or reproduction costs.

If we read petitioner's contentions aright, petitioner further suggests that even if the formula were reliable in an average case, petitioner is not an average railroad and is not to be bound by a formula based upon average or typical situations.

To these suggestions we reply:

In the first place, so far as this Court is concerned, it makes no difference whether the tax in question is called and is intended to be a tax upon property, upon franchises, upon income or upon any other basis. So long as Illinois has evolved, whether by legislation, administrative action or judical exposition, a formula applicable to all railroads, there is no discrimination, invidious or otherwise, so long as that formula is employed. This is true, we submit, even though petitioner should convince this Court that it was the victim of a grossly excessive valuation.

If a standard sound in the average case is applied to petitioner, petitioner can not complain if the result works a hardship upon it. In the Illinois Supreme Court, questions of State law were presented that may not be reviewed here. Whether this tax comports with Illinois' constitutional requirements for a property tax or does not comport there-

with, the only question here is whether Illinois has adopted and enforced an intrinsically legitimate formula of taxation and has applied it equally to all railroads.

In the second place, petitioner has failed to show that even if the tax in question must be regarded in this Court as an *ad valoren* tax, and of course need not be so regarded so long as a definitive formula is applied to all railroads, there has been any over-valuation. Its low earnings may have been due to improvident management or to heavy losses in other States instead of being due to a low "intrinsic value" of its physical real and personal property in Illinois.

The Illinois Supreme Court's decision is not in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Bailey* v. *Megan,* 102 F. 2d 651, and *Chicago and North Western Ry. Co.* v. *Eveland,* 13 F. 2d 442, even though the same railroad was involved and even though the *rationale* of the decision of the Court of Appeals for the Eighth differed from that of the Supreme Court of Illinois. The Court of Appeals for the Eighth Circuit had before it not only questions of due process and equal protection but plenary judicial discretion, similar to that possessed by the Supreme Court of Illinois, to review the assessment of petitioner's property. A mere difference between two tribunals as to appropriate standards of taxation does not result in a conflict upon a *constitutional* question.

Of course, on this application for *certiorari,* since it comes from a State and not a Federal court, this Court is restricted to constitutional considerations and may not exercise that independent jurisdiction that is possessed by State courts and lower Federal courts.

In *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 60 S. Ct. 98, 84 L. ed, 1254, at p. 369:

> "Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written test."

It appears from the record that petitioner's losses are largely the result of its western operations, not its intrinsically profitable operations in Illinois. There is no reason why the taxable valuation of Illinois property should be debased by unsuccessful operations in other States.

II.

Petitioner was not at liberty to explore or exploit the tax bases of other railroads.

Petitioner's very well written petition presents in attractive fashion its contention that it was at liberty to study in detail the tax situation of any or every other interstate railroad whose Illinois property was valued by the formula in question. The basis of this contention is petitioner's conception that it is the *result* of the formula *and not the formula itself that is important.*

But so far as Federal constitutional jurisprudence is concerned, this position is untenable.

If the formula is intrinsically fair in the average case and if it is applied to the case of railroads in general, then the situation of an atypical railroad, such as petitioner claims to be it entails a hardship is of no constitutional moment.

In the third place, taxation is a practical matter.

If due process or equal protection allows petitioner to try not only its own tax case but the tax case of every other railroad in Illinois, then every other railroad must have a like privilege. Every railroad could explore the tax situation of every other railroad.

The result would be a complete breakdown of the taxing processes of Illinois with respect to interstate railroads.

Conclusion.

For the reasons expressed in the opinion of the Supreme Court of Illinois and in this brief, it is respectfully submitted that *certiorari* should be denied.

Respectfully submitted,

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FILED
MAY 16 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

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No. 573

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Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

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On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN RESPONSE TO THIS COURT'S REQUEST AND IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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CHICAGO LAW PRINTING CORPORATION – FRANKLIN 2-6521

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In the brief filed by respondent in response to this Court's request: (1) it is conceded that the question is presented "whether Illinois' formula denies due process of law" (Br. p. 3); (2) the irreconcilable conflict with *Bailey* v. *Megan,* 102 F. 2d 651, is recognized (although

a technical distinction is suggested which the *Megan* opinion does not support); and (3) the discrimination between the assessment of petitioner's property and the property of the other Illinois railroads is not denied, but is brushed aside by saying in effect that this is not a matter concerning which petitioner has a right to inquire.

Respondent's statement (Br. p. 4) of what respondent conceives to be petitioner's contentions is misleading and inaccurate. The petitioner is not contending that the formula used by the Department "does not guarantee to any reasonable degree of assurance a valuation of railroad property as distinguished from a valuation of other elements * * *", nor does petitioner suggest that it "is not an average railroad and is not to be bound by a formula based upon average or typical situations". The State Constitution requires that all property be assessed uniformly. The statute requires assessment at "fair cash value." Petitioner asks that the constitutional requirements of due process and equal protection be given affect, to the end (1) that its property be not grossly overassessed through the reflection in the final valuation of a supposed standard of value (condemned in other decisions) having no logical relation to "fair cash value", and (2) that it be protected from the necessarily resulting discrimination against it, both as between petitioner's property and property generally, and as between petitioner's and other railroad property.

The suggestion, in this connection (Br. p. 4), that "so far as this Court is concerned, it makes no difference whether the tax in question is called and is intended to be a tax upon property, upon franchises, upon income or upon any other basis", is beside the point. The present Illinois Constitution does not permit the classification of property for taxation (with minor exceptions not here

material[1]); it contains no provision that would empower the state assessing officers to assess railroad property at a higher (or lower) percentage of "fair cash value" than other property; "every person and corporation" is required to pay a tax "in proportion to the value of his, her or its property" (see p. 5 of petitioner's original brief for text of provision); and it is the duty of assessing officers to assess railroad property on a uniform basis with property throughout the State. (Compare *Mobile and Ohio R. R.* v. *State Tax Commission*, 374 Ill. 75, 28 N.E. 2d 100.) Accordingly it is not correct, as respondent says (Br. p. 4), that "so long as Illinois has evolved, whether by legislation, administrative action or judicial exposition, a formula applicable to all railroads, there is no discrimination * * * so long as that formula is employed * * * even though petitioner should convince this Court that it was the victim of a grossly excessive valuation". That is just another way of saying that although the State Constitution commands uniformity and the statutes require all assessments to be at "fair cash value", yet the State administrative officers are at liberty, by a process of "evolution", to deny railroads the equal protection of these constitutional and statutory provisions. Such a construction would make a mockery of the equal protection clause. The very statement of the proposition condemns it.

Respondent, repeating the statement that the only question presented by the record "is whether Illinois' formula

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[1] There is pending a proposal to amend the Constitution so as to permit the legislature "to define and classify property for taxation", but even under the proposed amendment "all real estate shall constitute one class", so that the effect of the amendment, if adopted, on assessments of railroad property cannot now be foretold. Joint resolution, appearing in 1955 Session Laws, p. 2291.

denies due process of law" (Br. p. 3), also says in the same connection (Br. p. 5) that "the only question here is whether Illinois has adopted and enforced an intrinsically legitimate formula of taxation and has applied it equally to all railroads". In so stating the question, respondent evidently recognizes that the propriety, under present conditions, of the use of reproduction cost as a standard for valuing a railroad property presents a Federal constitutional question, as it clearly does.

Yet respondent with curious inconsistency seeks to avoid the significance of *Bailey* v. *Megan*, 102 F. 2d 651, and also *Chicago and North Western Ry. Co.* v. *Eveland*, 13 F. 2d 442, upon the narrow ground that "the Court of Appeals for the Eighth Circuit had before it not only questions of due process and equal protection but plenary judicial discretion, similar to that possessed by the Supreme Court of Illinois" (Br. p. 5), from which respondent concludes that "a mere difference between two tribunals as to appropriate standards of taxation does not result in a conflict upon a *constitutional* question". (Br. p. 5; emphasis is respondent's.) Respondent overlooks the fact that while it is true that there was diversity of citizenship in the *Megan* case, the opinion states at the very outset (102 F. 2d 651 at p. 653) that the claim of the railway trustee was "that the taxes assessed were based upon a valuation which was so excessive, arbitrary and discriminatory as to violate the due process and equal protection clauses of the Fourteenth Amendment". Respondent also overlooks the fact that the Court in that case made it plain that it was not merely exercising "plenary judicial jurisdiction"; for, although it said (at p. 655) that it would be "fairer" to take the average of the stock and bond valuation and capitalization of earnings valuation, yet, as there was "no constitutional requirement that the taxing authorities use any particular method", they

were at liberty to adopt the stock and bond valuation, the higher of the two, as the maximum system value. The earlier *Eveland* case likewise turned upon the constitutional point, not "plenary judicial discretion". These cases, and the decision below, are hopelessly in conflict, a conflict that can only be resolved by a decision of this Court.

There is what seems to be a studied attempt, in respondent's brief, to convey the impression that the formula has been equally applied to all Illinois railroads, without discrimination, and that its impact upon the petitioner's property is due to circumstances peculiar to petitioner which do not obtain in "average or typical situations" (Br. p. 4). It has been abundantly demonstrated not only that the reproduction cost of the Illinois railroads as a class is in most cases far out of line with commercial values, but also that in nearly all cases the other final assessments can be readily justified on the basis of standards other than reproduction cost. (See pages 10 to 12, inclusive, and page 30, of original petition, and appendices E and F.) The plain fact is that the formula, whether "intrinsically legitimate" or not, has not been consistently applied and followed. There is surely no uniformity in a practice which reduces the petitioner's formula result from $97,730,000 to $86,750,000, or 11 per cent, while the formula result of the Gulf, Mobile and Ohio is reduced from $71,657,000 to $49,395,000, or 31 per cent (Appendices E and F to petition).

Thus the very premise of respondent's position falls. Respondent asserts (Br. p. 6) that[1] "if the formula is intrinsically fair in the average case and if it is applied to the case of railroads in general, then the situation of

[1] The text is somewhat garbled. Doubtless what is meant is: "the fact that the situation of an atypical railroad, such as petitioner claims to be, entails a hardship", etc.

an atypical railroad, such as petitioner claims to be it entails a hardship is of no constitutional moment". This statement proves too much; as all the railroads received adjustments in amounts varying as widely as from 10 to 34 per cent, the formula was evidently not "intrinsically fair in the average case". Certainly the present petitioner presents a more convincing case for a drastic adjustment of the formula than most, if not all, the other roads assessed, most of which were treated far more leniently. The wide variation from 10 to 34 per cent in these adjustments to the formula results alone condemns the formula and demonstrates either that the formula was unsound, or that, if it were sound, the formula was not evenly applied among the railroads, with a heavy resulting discrimination against petitioner's property.

A difficulty often stressed in connection with the ascertainment of value of a railroad operating property is the fact that it is seldom that a railroad is sold, so that it is nearly always impossible to use the criterion of comparative sales to arrive at the value of a railroad property. We do however now have a concrete sale of an Illinois railroad property, made at arm's length, which sheds considerable light on the relative reliability of the standard of capitalized earnings, anticipated future earnings, and reproduction cost, as measures of value. Since the petition in this case was filed last December, the Interstate Commerce Commission has approved the purchase, by a group of railroads, of the Illinois Terminal Railroad, for a price far below its reproduction cost, but which does bear a reasonable relationship to past and prospective earnings. The Commission's decision, not yet reported, was rendered April 2, 1956, in Finance Docket No. 18752. The "book value", said by the Commission to be based on its "valuation" as of December 31, 1951, (*i.e.*, so-called "physical value") was stated, after depreciation and also after sub-

traction of indebtedness for equipment, to be $33,499,620.[1] Yet the purchase price was only $20,150,605, less than the "valuation" by about 35 per cent, or $13,349,015.[2] On the other hand, past earnings were a little less than five per cent, and after certain adjustments,[3] about 4¼ per cent, on the purchase price, from which fact the Commission said that "it is apparent * * * that the purchase price for the Illinois Terminal properties is fair, reasonable and fully justified".

Nor was that the whole picture. Of the depreciated "book value", a bridge over the Mississippi River, the McKinley Bridge, accounted for $2,224,903, although its earning power approximated over $365,000. As a part of the transaction, the purchasers plan to sell the bridge to public authorities for $13,500,000 and to lease back the right to operate railroad tracks over it. Thus, on this basis the purchasers would pay, net, only $6,515,635 ($20,015,635 less $13,500,000) for a railroad property having a depreciated "book value" of $31,459,856 ($33,684,759 less $2,224,903). It is apparent that the purchase price of the Illinois Terminal was not influenced to any degree by the so-called "physical value".

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[1] It is not clear from the Commission's opinion whether this "book value" represents the original Federal valuation plus the cost of subsequent additions and betterments, or represents reproduction cost at prices current in 1951. The figures are shown in a table in the opinion.

[2] This is shown in the table in the opinion as the "acquisition adjustment", provided for under Commission accounting rules, that is, the difference between book value before acquisition and the cost of acquisition.

[3] The Commission's opinion uses the phrase "adjusted net income" without explanation of the nature of the adjustments, but the context suggests the difference represents income of the bridge, which it is planned to sell to public authorities.

Respondent makes no attempt to controvert what is said in the petition regarding the decisions of this and other tribunals that in other situations have consistently held that under present day conditions there is no logical relationship between the reproduction cost of a railroad property and its value; it is not denied that the decision below is in conflict with the *Megan* case, although a half-hearted attempt is made to draw a distinction between the two cases on the ground that in the *Megan* case the Court was exercising "plenary judicial discretion"; no attempt is made to reconcile the decision below with, or distinguish it from, this Court's decision in *Great Northern Ry.* v. *Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532; and, finally, the obvious discrimination between the railroads themselves is not denied, but is passed over with the brief (and incorrect) comment (on p. 7), that if the challenge to this discrimination were upheld, it would mean that petitioner would be allowed "to try not only its own case but the tax case of every other railroad in Illinois". Respondent has not, it is submitted, rebutted the case made out in the petition for the granting of certiorari to review the decision below herein.

Respectfully submitted,

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